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April 28, 2009

BY E-FILING

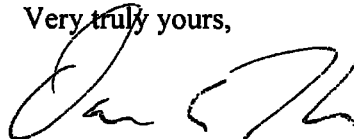
Anne K. Quinlan, Esquire
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

Re: *United States Department of Energy – Rail Construction & Operation – Caliente
Rail Line in Lincoln, Nye, & Esmerelda Counties, NV*, STB Finance Docket No.
35106

Dear Acting Secretary Quinlan:

Enclosed for filing in the above-referenced proceeding is the Reply of the Nuclear
Energy Institute to State of Nevada's Motion to Suspend or Reopen.

Very truly yours,



David A. Hirsh

Counsel for Nuclear Energy Institute

Enclosure

cc: All parties of record

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35106

UNITED STATES DEPARTMENT OF ENERGY
– RAIL CONSTRUCTION & OPERATION –
CALIENTE RAIL LINE
IN LINCOLN, NYE, & ESMERALDA COUNTIES, NV

**REPLY OF THE NUCLEAR ENERGY INSTITUTE
TO STATE OF NEVADA'S MOTION TO SUPEND OR REOPEN**

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BEFORE THE
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UNITED STATES DEPARTMENT OF ENERGY
– RAIL CONSTRUCTION & OPERATION –
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**REPLY OF THE NUCLEAR ENERGY INSTITUTE
TO STATE OF NEVADA’S MOTION TO SUPEND OR REOPEN**

On April 8, 2009, the State of Nevada (“Nevada”) filed a motion to suspend or, in the alternative, reopen these proceedings for further discovery, evidence, and argument (“Motion”). The Nuclear Energy Institute (“NEI”), the policy organization of the nuclear energy and technologies industry, hereby replies in opposition.¹ As discussed below, Nevada’s arguments for suspension or, alternatively, reopening, fail to support the relief sought. Accordingly, the Motion should be denied.

¹ NEI supported the Department of Energy’s (“DOE”) application in comments filed on July 15, 2008, and at the Board’s public hearing in Las Vegas on December 4, 2008. Contrary to Nevada’s suggestion (Motion at 27), NEI continues to support DOE’s application and the authorization and licensing of the Yucca Mountain project. Nevada states that NEI “has apparently conceded the death of the geologic repository,” citing a supposed “op-ed article” by NEI’s President, Marvin Fertel, entitled “Obama Strangling Yucca Mountain with Funding Cut,” in the February 27, 2009 issue of *Energy Daily*. *Id.* at 27 & n.34. The referenced article (attached hereto as Exhibit A), however, is a news item, not an “op-ed” piece, and it was not written by Mr. Fertel. Mr. Fertel’s views are discussed at the end of the article, but the article nowhere suggests that either Mr. Fertel or NEI concedes the death of the geologic repository or supports the suspension of licensing for the Yucca Mountain repository. To the contrary, in the same issue of *Energy Daily* cited by Nevada there is a commentary by Mr. Fertel (attached hereto as Exhibit B) entitled “Re-evaluating Nuclear Waste Policy,” in which Mr. Fertel clearly states that “[l]icensing of the Yucca Mountain repository should continue,” and that any blue ribbon panel should be convened “[i]n parallel” to licensing efforts.

Nevada argues first that given the Obama administration's opposition to proceeding with the Yucca Mountain nuclear waste repository and its anticipated reduced budget, the Board should suspend the present licensing proceedings to avoid construction of "a rail line to nowhere" or a railroad for which there is no public demand. Motion at 5-6, 22-28.

Despite uncertainty about the future of the Yucca Mountain project, it is entirely appropriate for DOE to continue seeking approval of its application and for the Board to issue its final decision without delay. Nevada's argument to the contrary confuses the position of the Obama administration with the law. Regardless of the present position of the current administration, the fact remains that the Nuclear Waste Policy Act of 1982, as amended ("NWPA"), is still the law of the land, and that in combination with the Yucca Mountain Development Act (Public Law 107-200), it requires DOE to seek to construct and operate the Yucca Mountain repository. DOE's application to the STB therefore remains part of DOE's effort to comply with existing law. In view of DOE's duty, and the Board's own statutory duty to approve proposed railroad construction unless it finds that it would be "inconsistent with the public convenience and necessity," 49 U.S.C. § 10901(c), it would be inappropriate and contrary to law for the Board to obstruct DOE's licensing efforts by suspending the present proceeding.

Further, Nevada's suggestion that the Obama administration's position or possible future budget somehow undermines the substance of DOE's application is incorrect. As the Board noted previously in this proceeding in denying Nevada's earlier motion to reject, a Board grant of construction and operation authority is permissive. June 27, 2008 Decision at 3. Thus, granting DOE's application will not compel DOE to construct an unnecessary railroad line. DOE can and will proceed with construction of the proposed Caliente Line if and when the federal government provides the necessary funding, based on a decision to proceed with the

Yucca Mountain repository. Thus, if DOE proceeds with construction of the line it will only be because there is a public need and demand for it. There is no realistic prospect that DOE will construct “a rail line to nowhere.”

Nevada’s other major argument is that possible funding limits and DOE’s “cumulative filings to date,” which Nevada defines to include all DOE filings in this proceeding, plus various other DOE analyses, decisions, and plans, constitute “materially changed circumstances” justifying reopening for discovery and additional comments. Motion at 6-9, 29-79. This is a transparent and improper effort by Nevada to delay these proceedings based on events and documents that are neither new nor material to the relevant statutory criteria for approval of DOE’s application. The Yucca Mountain project has been underfunded for many years; the fact that it remains so is hardly a changed circumstance. Neither does Nevada explain how the prior filings in this very proceeding and other documents that are months old suddenly constitute “changed circumstances.” Most fundamentally, Nevada’s claims, most of which are simply rehashed arguments previously dismissed by the Board in its June 27, 2008 Decision or addressed by DOE or NEI in their reply filings, uniformly fail to raise any substantial question as to whether DOE’s application actually meets the criteria for Board approval.

The record herein has been closed and complete for several months,² and it amply supports DOE’s application. All that remains is for the Board to issue its final decision.

² Nevada claims, based on two Board decisions, that when the Board established its procedural schedule in this proceeding (by decision served April 11, 2008) Nevada “presumed” that comments on environmental issues would “be invited later before issuance of a [certificate of public convenience and necessity].” Motion at 4-5 (citing *United States Dep’t of Energy – Rail Construction & Operation – Caliente Rail Line in Lincoln, Nye, & Esmeralda Counties, NV*, STB Finance Docket No. 35106 (STB served June 27, 2008) (“June 27 Decision”); *Alaska R.R. – Construction & Operation Exemption – Rail Line Between Eielson Air Force Base (North Pole) & Fort Greeley (Delta Junction), AK*, STB Finance Docket No. 34658 (STB served Oct. 4, 2007) (“*Alaska Railroad*”)). See also *id.* at 21-22. Whether or not that was Nevada’s presumption, it

Suspension of this proceeding at this late date would serve no useful purpose; it would instead waste the time and resources of the Board, DOE, and other parties, such as NEI, who have participated in this proceeding in good faith.

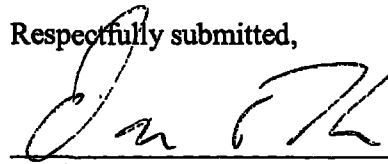
CONCLUSION

NEI respectfully urges the Board to deny Nevada's Motion and promptly grant DOE's Application based on the existing record, without further evidence or argument.

was baseless, and Nevada cannot use its own misapprehension as a bootstrap argument for a right to comment once again on DOE's environmental impact statements ("EIS").

As DOE and NEI have previously shown, the Board is not required to conduct its own public comment process as part of its environmental review for this proceeding. DOE Reply Comments at 24-26; NEI Comments at 19-20 (July 15, 2008). Nothing in the Board's decisions in this proceeding, including the June 27 Decision cited by Nevada, stated that the Board would go beyond the requirements of the law and reopen DOE's EISs for further comments. To the contrary, the Board made clear in its April 11, 2008 decision that DOE's Nevada rail corridor and alternative rail alignment EISs, and the public comments that it noted had already been taken on those EISs, would "serve as the basis for SEA's recommendations to the Board regarding whether, from an environmental perspective, DOE's construction and operation application should be granted, denied, or granted with environmental conditions." April 11, 2009 Decision at 3. Finally, far from supporting Nevada's argument, the Board's *Alaska Railroad* decision undermines Nevada's claims. The decision stands for the proposition that the Board will no longer issue a grant of conditional authority in construction cases pending completion of environmental review. In other words, the Board generally will *not* adopt the bifurcated comment approach that Nevada now claims it expected.

Respectfully submitted,



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April 28, 2009

EXHIBIT A

Friday, February 27, 2009

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THE ENERGYDAILY

Business and Policy Coverage of the Power, Natural Gas, Oil, Nuclear and Renewables Industries

www.TheEnergyDaily.com

Obama Strangling Yucca Mountain With Funding Cut

BY JEFF BEATTIE

The Obama administration made official yesterday what many nuclear power supporters have feared for months: The administration plans to cut virtually all funding for the Yucca Mountain nuclear waste repository in Nevada and pursue another strategy for disposing of the nation's high-level nuclear waste.

In the fiscal 2010 budget outline for the Energy Department, the administration said "the

Yucca Mountain program will be scaled back to those costs necessary to answer inquiries from the Nuclear Regulatory Commission, while the administration devises a new strategy toward nuclear waste disposal."

The budget plan dovetails with recent statements by Energy Secretary Steven Chu that the Obama administration will proceed with the NRC licensing process, but may not build the repository. The continu-

(Continued on p. 2)



Obama Strangling Yucca Mountain With Funding Cut... (Cont. from p. 1)

ation of the licensing process presumably is needed to avoid utility lawsuits charging violation of the Nuclear Waste Policy Act, which requires DOE to dispose of spent fuel from commercial reactors.

Obama's budget proposal does not specify how much money DOE will request for its work with the NRC, which is reviewing a license application for Yucca that DOE submitted last summer after years of delay. Congress has allocated \$288 million for Yucca in the current fiscal year.

Most significant is the administration's declaration that it plans to abandon the proposed national spent fuel repository at Yucca, which has been under study and development for more than two decades at a cost of more than \$9 billion.

Whatever other objections the administration may have about Yucca, it is clear Obama was nudged towards opposing the project by Senate Democratic Leader Harry Reid (Nev.), who says the project is unsafe and was unfairly thrust upon his state years ago as a result of political horse-trading. Obama, as well as then-rival Hillary Clinton, both declared their opposition to Yucca Mountain during the Democratic primaries.

Reid declared victory in a written statement released late Wednesday: "...I could not be happier for the people of Nevada. Make no mistake: this represents a significant and lasting victory in our battle to protect Nevada from becoming the country's toxic wasteland."

What is unclear is what the administration will propose as an alternative to Yucca. After studying alternatives such as launching nuclear waste into the sun, dropping it into the ocean floor, letting waste containers melt their way to the bottom of polar ice caps or storing it indefinitely above-ground, most of the world's scientific bodies have identified deep geo-

logic burial as the preferable option for managing spent fuel and high-level waste.

Many sources expect the administration to appoint a "blue ribbon" panel to re-think the nation's nuclear waste management strategy; provisions mandating such a group were included for a time in the recently enacted stimulus package, but were removed before the bill passed Congress.

One option is legislation introduced by Reid that would direct DOE to assume legal responsibility for spent fuel where it is currently stockpiled next to commercial reactors, and to manage it there.

Under the previous administration of George W. Bush, the Energy Department began to seriously reconsider the option of reprocessing and recycling spent fuel, although that option is technically difficult, hugely expensive and does not remove the need to dispose of certain volumes of waste in a repository like Yucca. Reprocessing also is detested by environmentalists and nonproliferation advocates because it generates high-level radioactive waste and recycles weapons-usable plutonium.

The nuclear industry has backed Yucca Mountain as key to solving the nation's nuclear waste dilemma and thus clearing the way for expansion of nuclear power. Recently, however, some nuclear officials have focused on finding an alternative site for long-term centralized storage of fuel in a volunteer community that might covet the jobs that such a project would bring.

Marvin Fertel, president and chief executive officer of the Nuclear Energy Institute, the nuclear utility trade group, says development of interim storage at a public or private site should be a top priority. He also has endorsed the idea of an independent expert panel to review spent fuel management options, and encouraged continued research on spent fuel recycling.

EXHIBIT B

Re-evaluating Nuclear Waste Policy

COMMENTARY

BY MARVIN S. FERTEL

Since Congress passed the Nuclear Waste Policy Act in 1982, our nation has been pursuing a path for the ultimate disposal of used nuclear fuel using a once-through fuel cycle. An opportune time to re-evaluate this policy has arrived.

Analyses of the climate change issue by almost all independent organizations show that reducing carbon emissions and meeting our electricity needs will require a portfolio of technologies and that nuclear energy must be part of the portfolio.

Given the clear need for expansion of nuclear energy programs in the United States and worldwide, the nuclear industry proposed two years ago that our nation should revisit the decision to use a once-through fuel cycle and instead pursue a closed fuel cycle that includes recycling. This integrated approach includes at-reactor storage, private sector or government-owned centralized storage, research and development on recycling technology and continued development and licensing of a federal repository.

It is also clear from President Obama's 2010 budget plan that the administration may not support opening the Yucca Mountain repository even if it receives a license from the Nuclear Regulatory Commission. The administration indicated that the Energy Department's budget will be scaled back to a level necessary to answer questions from the NRC regarding the repository license application.

Given that the Nuclear Waste Policy Act remains the law of the land, and recognizing the legal and moral obligation that the government has to fulfill its responsibility under that law, the industry believes the NRC's review of the Yucca Mountain license application should continue.

In parallel, the administration should convene an independent panel of the best scientific, environmental, engineering and public policy leaders to fully

investigate the critical issues and make a recommendation to President Obama and Congress on how best to proceed with managing used nuclear fuel.

Our approach to developing an integrated nuclear fuel management program includes the following concepts:

First, we recognize that since used nuclear fuel can be safely and securely stored for an extended period of time, interim storage represents a strategic element of an integrated program. Therefore, we can continue on-site storage of used reactor fuel while candidates are identified for volunteer private or government-owned sites for consolidation of used nuclear fuel.

DOE must take title to and consolidate used fuel at private or government centralized storage facilities to begin meeting the federal government's legal commitment. Initially, centralized facilities should provide storage for reactor fuel from power plants that have been shut down. DOE also needs to address its obligation for the removal and disposal of high-level radioactive waste from government sites.

Second, the federal government should collaborate with the private sector and other countries on a research and development and demonstration program to recycle reactor fuel in a way that is safe, environmentally acceptable, enhances the worldwide nonproliferation regime and makes sense economically. Other countries are looking at recycling as part of their used nuclear fuel management program and the United States should be constructively engaged in this technology development.

Through recycling, we can reclaim and reuse a significant amount of energy

that remains in uranium fuel and reduce the heat, volume and toxicity of radioactive byproducts that ultimately will be placed in a repository.

Third, even with a closed fuel cycle, a geologic repository will be needed for the ultimate disposal of the waste byproducts. Licensing of the Yucca Mountain repository should continue, but the characteristics of the waste form requiring disposal will influence the design of the repository. The results of an independent commission's strategic assessment of the overall approach to used fuel and defense waste management can provide direction in that regard.

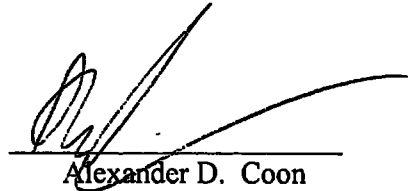
If the administration unilaterally decides to abandon the Yucca Mountain project without enacting new legislation to modify or replace existing law, it should expect a new wave of lawsuits seeking further damage payments as well as likely requests for refunding of at least \$22 billion already collected from consumers that has not been spent on the program from the Nuclear Waste Fund. Further, given the uncertain path forward for the Yucca Mountain project and the difficult economic times facing American families and businesses, Energy Secretary Steven Chu should reduce the fee paid by consumers to cover only licensing costs incurred by DOE, NRC and local Nevada government units that provide oversight of the program.

During his Senate confirmation hearing, Secretary Chu said his agency has an obligation to provide a plan that allows for safe disposal of used nuclear fuel. Nuclear energy should be part of our energy mix, he said, and "in going forward with that, we do need a plan on how to dispose of that waste safely over a long period of time."

—Marvin S. Fertel is president and CEO of the Nuclear Energy Institute in Washington, D.C.

CERTIFICATE OF SERVICE

I certify that I have this 28th day of April, 2009, served copies of the foregoing Reply of the Nuclear Energy Institute to State of Nevada's Motion to Suspend or Reopen upon all parties of record in this proceeding by first-class mail, postage prepaid, or a more expeditious method of delivery.



Alexander D. Coon